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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1953

No. 316

JOHN CIFOLO, JOSEPH CISULO, PIERCE FELPAL, JOHN GABRIELE, EMIL KONETSKY, LOUIS KOUTNY, STEPHEN LABSKY, NANCY MADONNA, ALWANDRO MAZZUCCO, STEPHEN MULLEN, EDWARD REISINGER, PHILIP STAGNITTA, WALTER TUNISZEWSKI, STANLEY SALUCKI, M. ZOMBROWSKI, GUSTAVE ZULKE, FRED COPE, CHARLES DAVIS, LYLE DEAN, FRED DEWITT, ALEXANDER GREY, SALTURE JENNINGS, LEO LUKE, MICHAEL LUZAK, HENRY MARGEIT, ATLEY MOORE, JOSEPH PETTI, GLENN SAXBURY, ANTHONY SHERANT and LEROY WOODRUFF,

Petitioners,

—v.—

GENERAL ELECTRIC COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
Argument	5
Point I	10
Point II	15
Conclusion	17
Appendix A	18

TABLE OF CASES

American Knife Company *et al.* v. Sweeting, 250 U. S. 596 (1919), *affirming* 226 N. Y. 199 (1919) .. 12

Barrencotto v. Cocker Saw Co., Inc., 266 N. Y. 139, 194 N. E. 61 (1934) 6

Farnum v. Garner Print Works and Bleachery, 229 N. Y. 554, 129 N. E. 912 (1920) 12

In the Matter of the Claim of Alice Gorle v. Joy Co. *et al.*, 230 N. Y. 595, 130 N. E. 908 (1921) 12

Masich v. United States Smelting, Refining & Mining Co., *et al.*, 113 Utah 101, 191 P. 2d 612 (1948), *appeal dismissed,* 335 U. S. 866 (1948), *rehearing denied,* 335 U. S. 905 (1949) 10, 11, 15

PAGE

Middleton v. Texas Power and Light Company, 249 U. S. 152 (1919) 11

Moffett v. Harbison-Walker Refractories Company, 339 Penna. 112, 14 A. 2d 111 (1940) 15

Morris v. Muldoon, 229 N. Y. 611, 129 N. E. 928 (1920) 12

New York Central R.R. Co. v. White, 243 U. S. 188 (1917) 12

Repka v. Fedders Manufacturing Company, 264 N. Y. 538, 191 N. E. 553 (1934) 12

Scherini v. Titanium Alloy Company, 286 N. Y. 531, 37 N. E. 2d 237 (1941) 16

Silver v. Silver, 280 U. S. 117 (1929) 11

STATUTES

Colorado

Colo. Stat. Ann. c. 97 §§450, 458-459 14

Florida

Fla. Stat. Ann. §§440.11, 440.151(6)(c) 14

Iowa

Ia. Code Ann. §§85A.13(3), 88A.16, 85.20 14

Maryland

Md. Code Ann. art. 101, §§14, 23(b) 14

Michigan

Mich. Stat. Ann. §§17.144, 17.223 14

Minnesota

Minn. Stat. Ann. §§176.04, 176.664 14

New Mexico

N. M. Stat. Ann. §§57-1104(a), 57-1107, 57-1110(a) (Cum. Supp. 1951) 14

PAGE

New York

N. Y. Laws 1935, c. 254, §1 ..... 2, 18
N. Y. Laws 1936, c. 887, §§1, 2 ..... 2, 19
N. Y. Laws 1922, c. 615, §1 [N. Y. Work. Comp. Law §§10, 11] 2, 5, 18, 20
N. Y. Laws 1947, c. 431, §§1, 2 [N. Y. Work. Comp. Law §3(2 ¶¶28, 29)] 2, 20
N. Y. Laws 1947, c. 431, §8 [N. Y. Work. Comp. Law §39] 2, 21

Ohio

Ohio Gen. Code §§1465-68a, 1465-70 14

Pennsylvania

77 Penn. Stat. Ann. §§1401(e), 1403 14

South Dakota

S. Dak. Laws of 1947, c. 426, §§64.0803, 64.0811 .. 14

Utah

Utah Code Ann. §§35-2-3, 35-2-13 14

AUTHORITIES

Governor's Memorandum on signing Chapter 431 of the Laws of 1947, Public Papers of Thomas E. Dewey, Fifty-first Governor of the State of New York p. 319 (1947) 8, 9, 13

IN THE

Supreme Court of the United States

October Term, 1953

JOHN CIFOLO, FRED COPE, *et al.*,
Petitioners,
—*v.*—
GENERAL ELECTRIC COMPANY,
Respondent.

No. 316

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the New York Supreme Court is reported at 101 N. Y. S. 2d 46 (1950); the opinion of the Appellate Division of the New York Supreme Court is reported at 279 App. Div. 884 (1st Dep't 1952); and the opinion of the New York Court of Appeals is reported at 305 N. Y. 209 (1953).

Jurisdiction

The jurisdiction of the Court is invoked under 62 Stat. 929, 28 USC §1257(3) (1948) to review a judgment of the Court of Appeals of the State of New York.

Questions Presented

1. Whether the dismissal by the New York Court of Appeals, pursuant to the requirements of the New York Workmen's Compensation Law, of an action by petitioners at common law against their employer to recover damages for personal injuries which were sustained in the course of their employment and which resulted in partial disability due to silicosis, was violative of the Fourteenth Amendment to the Constitution of the United States?

2. Did the New York Court of Appeals base its decision on an adequate non-federal ground?

Statutes Involved

The pertinent provisions of the New York Workmen's Compensation Law are as follows:

1935 Law

N. Y. Laws 1935, c. 254, §1.

1936 Law

N. Y. Laws 1936, c. 887, §§1, 2.

1947 Law

N. Y. Laws 1922, c. 615, §1.
[N. Y. Work. Comp. Law §§10, 11.]
N. Y. Laws 1947, c. 431, §§1, 2.
[N. Y. Work. Comp. Law §3(2 ¶¶28, 29).]
N. Y. Laws 1947, c. 431, §8.
[N. Y. Work. Comp. Law §39.]

The provisions above cited are set forth in Appendix A hereto.

Statement

Thirty employees of the defendant (in two separate actions which have been consolidated on this Petition) sued the defendant at common law, asking damages of $50,000 each. Liability of defendant was predicated upon allegations of defendant's negligence and violations by the defendant of the New York Labor Law. Each petitioner claimed that he had, in the course of his employment, become partially disabled by silicosis. Each petitioner was engaged by the defendant in defendant's Schenectady or Elmira foundry, and each employment was included among those classified as "Hazardous employments" under §3 of the New York Workmen's Compensation Law. Defendant has concededly complied with all requirements of the New York Workmen's Compensation Law with respect to payment of compensation to its employees under the Law (BR. 69).* Silicosis and other dust diseases are included among the occupational diseases covered by the Law. Under the present New York Workmen's Compensation Law, in cases of silicosis or other dust diseases compensation is payable for death or total disability, whether permanent or temporary, but it is not payable for partial disability. Under the 1935 law compensation was payable for either total disability or partial disability.

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* We shall follow the system of record references used by the petitioners: *i.e. Cifolo* case record is AR. and *Cope* case record is BR.

Defendant moved under the New York Civil Practice Act for dismissal of the complaints on the ground that they failed to state facts sufficient to constitute a cause of action, and that the Court lacked jurisdiction of the subject of the action (BR. 68). The New York Supreme Court granted the motions dismissing the complaints, and the Appellate Division of the New York Supreme Court and the Court of Appeals affirmed the orders granting the motions to dismiss (BR. 69).

The New York Courts held that the New York Workmen's Compensation Law barred actions at law by the petitioners for injuries sustained in the course of their employment, and that the New York Legislature acted within its powers in passing the law (BR. 70). Petitioners' contention that the statute violated the Fourteenth Amendment to the Constitution of the United States was rejected (BR. 68, 70). The Court of Appeals also held that even if petitioners' contention of unconstitutionality were sustained, the actions for damages at law should still be dismissed (BR. 70).

Argument

The issues on this petition are (1) whether petitioners were deprived of rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States when their actions at law for damages for injuries sustained in the course of their employment were dismissed pursuant to the provisions of the New York Workmen's Compensation Law, and (2) whether the New York Court of Appeals based its decision upon an adequate non-federal ground.

The New York Workmen's Compensation Law (§§10 and 11) provides that where, as here, an employment falls within the group of "Hazardous employments" as set forth in §3 of the Law, and where the injury or disease is listed among those covered by the Law, and where the employer has provided for payment of compensation to its employees pursuant to the Law, then the liability of the employer under the Compensation Law is "exclusive and in place of any other liability whatsoever, • • • at common law or otherwise on account of such injury or death, • • • ", sustained in the course of the employment. The New York Courts held that the fact that petitioners at their present stage of partial disability are not yet entitled to compensation under the Law did not affect the provisions of the Law barring them from maintaining their present actions for damages at law. The requirement of the Law limiting compensation for silicosis to cases of total disability was found not to render unconstitutional the bar against common law actions by the petitioners for any injuries sustained in the course of their employment.

It is necessary to set out the development of the Law in some detail because, as we shall show, the question of unconstitutionality cannot affect the correctness of the dismissal of petitioners' complaints, since the New York Court of Appeals relied upon an adequate non-federal ground.

Prior to 1935 silicosis and other dust diseases were not included among the compensable occupational diseases covered by the New York Workmen's Compensation Law. As a consequence, the common law right of an employee to sue at law for damages for silicosis sustained as a result of the employer's fault, continued unaffected by the Workmen's Compensation Law.

> *Barrencotto* v. *Cocker Saw Co.*, 266 N. Y. 139, 194 N. E. 61 (1934).

By Chapter 254 of the Laws of 1935 the Legislature amended the Workmen's Compensation Law by adding a new paragraph 28 to §3(2). Under this paragraph 28 there was added to the list of compensable occupational diseases a general reference to "any and all occupational diseases". Section 10 of the Law provided for the payment by an employer of compensation for "disability or death from injury arising out of and in the course of the employment". Section 11 provided:

> "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever * * * at common law or otherwise on account of such injury or death, * * * ".

Thus, under the 1935 law silicosis, whether resulting in total or partial disability, was compensable under the

Workmen's Compensation Law like any other occupational disease, and the right of employees to sue for damages at common law in silicosis cases was barred.

In 1936, by Chapter 887 of the Laws of 1936, silicosis and other dust diseases were excluded from the general application of §3(2), paragraph 28. The whole matter of silicosis and other dust diseases was separately dealt with in a new Article 4A (§§65-72 of the New York Workmen's Compensation Law). Section 66 of Article 4A established compensation for total disability or death resulting from silicosis or other dust diseases at a lower rate than that allowed for other occupational diseases. With respect to cases of partial disability resulting from silicosis, it was provided that:

> "Compensation shall not be payable for partial disability due to silicosis or other dust disease. * * *."

Section 72 provided that the liability of an employer under Article 4A

> "shall be exclusive and in place of any other liability whatsoever, at common law or otherwise, to such employee * * * on account of any injury, disability, or death, caused by the inhalation of harmful dust * * * ".

This provision making the compensation remedy exclusive in all silicosis cases was expressed in language almost identical to that of §11, under which liability of the employer under the Workmen's Compensation Law was made exclusive in all other cases of injury or disease sustained in employments covered by the Law.

In 1947, Article 4A was repealed by Chapter 431 of the Laws of 1947, and new provisions regarding silicosis and other dust diseases were written into the Law. The new Law was "satisfactory alike to both houses of labor, industry, and carriers".

> See *Governor's Memorandum on signing Chapter 431 of the Laws of 1947,* Public Papers of Thomas E. Dewey, Fifty-first Governor of the State of New York p. 319 (1947).

Under the 1947 Law, benefits equal to those payable for other occupational diseases were provided for cases of silicosis and other dust diseases resulting in total disability or death. A new paragraph 28 to §3(2) added to the list of compensable diseases the following:

> "Silicosis or other dust diseases resulting in total disability or death."

An omnibus category covering "any and all occupational diseases", formerly included in paragraph 28 of §3(2), was listed in paragraph 29 of §3(2), but this category was stated not to apply to "any disability or death due to any disease described by paragraph twenty eight of this subdivision." Section 11, barring common law actions remained unchanged. Section 39* was amended to provide, perhaps redundantly, that "compensation shall not be payable for partial disability due to silicosis".

The 1947 bill was described by the Governor as representing "for workmen's compensation in this state a high mark of achievement in group cooperation".

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* There are two sections so numbered. We refer to the second such section.

See *Governor's Memorandum on signing Chapter 431 of the Laws of 1947,* Public Papers of Thomas E. Dewey, Fifty-first Governor of the State of New York p. 319 (1947).

Under the New York Workmen's Compensation Law therefore, it has always been provided that liability of the employer to provide workmen's compensation in every case of occupational disease covered by the Law is exclusive and in place of any liability, at common law or otherwise. Under the 1935 Law employees were entitled to compensation for partial disability as well as total disability or death resulting from silicosis. The 1936 and 1947 Laws, however, expressly provided that compensation is not payable for partial disability resulting from silicosis or other dust diseases. Thus, since 1935 the bar to actions at law in all silicosis cases has continuously been in effect—the only change has been with respect to the stage of the disease at which compensation becomes payable.

On this state of the law the decision of the New York Court of Appeals in affirming the order dismissing the complaints was clearly correct. On the question of constitutionality under the Fourteenth Amendment, the decision was in accordance with the decisions of this Court, and in accordance with the decisions of the highest court of every State which has considered the question. Furthermore, regardless of any decision on the constitutionality of the Law, the dismissal of the complaints was required under New York law. The New York Court of Appeals held not only that the statute was constitutional, but also that even if petitioners' claims of unconstitutionality were

correct "it would merely mean that partially disabled claimants would be thrown back onto the 1935 statute which authorized workmen's compensation for both partial and total disability from silicosis" (BR. 70).

It must follow that the petition for certiorari should be denied because petitioners have not presented an important or doubtful question to be decided by this Court, and because the New York Court of Appeals based its decision upon an adequate non-federal ground.

In Point I we shall discuss the question of constitutionality. In Point II we shall discuss the adequate non-federal ground upon which the New York Court of Appeals based its decision.

Point I

There is no important or doubtful question of constitutionality under the Fourteenth Amendment.

In *Masich* v. *United States Smelting, Refining & Mining Co., et al.,* 335 U. S. 866 (1948), *rehearing denied,* 335 U. S. 905 (1949), this Court dismissed an appeal brought by an employee in a case which appears to have involved almost precisely the same issues as are presented here. The case brought into question Sections 35-2-3 and 35-2-13 of the Utah Code, which closely resembles the New York Law on this point. The Utah Supreme Court in *Masich* v. *United States Smelting, Refining & Mining Co., et al.,* 113 Utah 101, 191 P. 2d 612 (1948) had held that actions at law for damages for partial disability resulting from silicosis were barred under the Utah Statute. The case came to this Court by appeal from the decision of the

Utah Supreme Court. This Court dismissed the appeal for want of a properly presented federal question. On motion for rehearing, arguments respecting unconstitutionality of the Law under the Fourteenth Amendment were presented by the petitioner and answered by the respondent. This Court denied the motion for a rehearing. *Masich* v. *United States Smelting, Refining & Mining Co., et al.,* 335 U. S. 905 (1949).

Petitioner's contention is that since compensation is not payable for the particular degree of disability sustained by petitioners, they cannot properly be deprived of their right to sue for common law damages for the injuries which fail to qualify them for compensation. Their position is contrary to the settled law on the question.

Workmen's Compensation Laws try to balance the equities between the employer and the employee. They give a remedy many times in cases where the employee would have been denied recovery at common law. In all cases they take away the common law right of action. Their objective is to create a certain, quick and inexpensive remedy, generally available to employees regardless of fault and without the limitations imposed at common law with respect to contributory negligence, assumption of risk, the fellow servant rule and similar ancient common law defenses. An employee's right to liberty or property, like the similar rights of other persons, does not include any vested right to have the common law rules remain unchanged for his benefit.

Middleton v. *Texas Power and Light Company,* 249 U. S. 152 (1919);
Silver v. *Silver,* 280 U. S. 117 (1929).

It is not unreasonable or arbitrary for the State to modify the nature and extent of the duty of employer to employee, with corresponding change in the test of negligence.

> *New York Central R. R. Co.* v. *White,* 243 U. S. 188 (1917).

Occupational injuries and diseases, which would have given a right to damages at common law, are often sustained by employees without any resultant disability. Under the Compensation Law compensation is ordinarily not payable unless disability is established, but the lack of a right to compensation in particular instances where actions for damages lay at common law is not sufficient to find the Law unconstitutional under the Fourteenth Amendment.

> *American Knife Company, et al.* v. *Sweeting,* 250 U. S. 596 (1919), *affirming* 226 N. Y. 199 (1919);
>
> *Morris* v. *Muldoon,* 229 N. Y. 611, 129 N. E. 928 (1920);
>
> *Farnum* v. *Garner Print Works and Bleachery,* 229 N. Y. 554, 129 N. E. 912 (1920);
>
> *In the Matter of the Claim of Alice Gorle* v. *Joy Co., et al.,* 230 N. Y. 595, 130 N. E. 908 (1921);
>
> *Repka* v. *Fedders Manufacturing Company,* 264 N. Y. 538, 191 N. E. 553 (1934).

In the particular instance of silicosis the New York Legislature has imposed the requirement that a higher degree of disability must be established before the employee is entitled to compensation. The reason for this

added requirement in silicosis cases lies in the Legislature's recognition of the "difficulties in diagnosis and in correlating disabilities with the progress of the disease itself".

> See *Governor's Memorandum on signing Chapter 431 of the Laws of 1947,* Public Papers of Thomas E. Dewey, Fifty-first Governor of the State of New York p. 319 (1947).

The New York Legislature's continuing consciousness of the problem is shown by its action in passing Chapter 491 of the Laws of 1947. Under that law there was appropriated the sum of $50,000 to provide for continued research in connection with the diagnosis and evaluation of the progressive degrees of disability and incapacity that may result from silicosis and other dust diseases.

> See *Governor's Memorandum on signing Chapter 431 of the Laws of 1947,* Public Papers of Thomas E. Dewey, Fifty-first Governor of the State of New York p. 319 (1947).

Thus far, no solution to the problem of assessing degrees of partial disability in silicosis cases has been found by the New York Legislature. But in requiring that the stage of total disability must be reached before compensation is payable, and that in all events actions at law for damages are barred, the Legislature has done no more than has been done in all instances where the disability requirement and the exclusive remedy provisions deprive an employee of a common law right to damages without giving him a commensurate right to compensation.

The Legislatures of at least eleven other States have adopted similar provisions in this field for apparently the same reasons. States which provide compensation in silicosis cases only where total disability results, but which bar actions at law regardless of the stage of disability are as follows:

1. *Colorado,* Colo. Stat. Ann. c. 97 §§450, 458-459;
2. *Florida,* Fla. Stat. Ann. §§440.11, 440.151(6)(c);
3. *Iowa,* Ia. Code Ann. §§85A.13(3), 88A.16, 85.20;
4. *Maryland,* Md. Code Ann. art. 101, §§14, 23(b);
5. *Michigan,* Mich. Stat. Ann. §§17.144, 17.223;
6. *Minnesota,* Minn. Stat. Ann. §§176.04, 176.664;
7. *New Mexico,* N. M. Stat. Ann. §§57-1104(a), 57-1107, 57-1110(a) (Cum. Supp. 1951);
8. *Ohio,* Ohio Gen. Code §§1465-68a, 1465-70;
9. *Pennsylvania,* 77 Penn. Stat. Ann. §§1401(e), 1403;
10. *South Dakota,* S. Dak. Laws of 1947, c. 426, §§64.0803, 64.0811;
11. *Utah,* Utah Code Ann. §§35-2-3, 35-2-13.

The highest State Courts which have considered the present question of constitutionality have, like the New York Court of Appeals, found nothing arbitrary or unreasonable in the action of their legislatures.

Masich v. *United States Smelting, Refining & Mining Co., et al.*, 113 Utah 101, 191 P. 2d 612 (1948);

Moffett v. *Harbison-Walker Refractories Company*, 339 Penna. 112, 14 A. 2d 111 (1940).

We submit, therefore, that the dismissal by the New York Courts of petitioners' claims for damages at common law was clearly correct, and that no important or doubtful question under the Fourteenth Amendment is presented.

Point II

The New York Court of Appeals based its decision upon an adequate non-federal ground.

The 1935 Law provided for payment of compensation in all cases of total or partial disability resulting from silicosis, and actions for damages at law in all cases were barred. Thus under the 1935 Law petitioners would be entitled to compensation and only to compensation. The changes effected by the 1936 and 1947 Laws consisted, in substance, of denying to partially disabled employees the right to compensation which had previously been given them by the 1935 Law. If the action of the New York Legislature in passing the 1936 and 1947 Laws were held to deprive the petitioners of their constitutional rights under the Fourteenth Amendment, the dismissal of the present action for damages would still be required. Petitioners' sole claim would then be for the compensation guaranteed to them under the 1935 Law, because the

1935 Law would under those circumstances be the applicable law of New York. They could in no event successfully assert claims to damages at law, which were barred under the 1935 Law and have remained barred under every version of the law since then. The New York Court of Appeals has held that under New York law, if the restrictions imposed by the 1936 and 1947 Laws are unconstitutional, an employee suffering partial disability from silicosis still cannot sue for damages but must claim compensation under the 1935 Law.

> *Scherini* v. *Titanium Alloy Co.*, 286 N. Y. 531, 37 N. E. 2d 237 (1941).

In its opinion in the present case the Court of Appeals referred to the *Scherini* case with approval. It then stated that petitioners' contention of unconstitutionality "even if correct, would not authorize a common law suit since it would merely mean that partially disabled claimants would be thrown back onto the 1935 statute which authorized workmen's compensation for both partial and total disability from silicosis" (BR. 70). Thus, regardless of the constitutionality or unconstitutionality of the present New York Law, petitioners' present claim for damages would still be barred under New York law. Their actions were, therefore, properly dismissed by the New York Courts.

It follows that the present petition presents no question for the decision of this Court.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 14, 1953

APPENDIX A

Statutes Involved

NEW YORK WORKMEN'S COMPENSATION LAW—1935

New York Laws 1935, c. 254, §1.

"2. **Occupational diseases.** Compensation shall be payable for disabilities sustained or death incurred by an employee resulting from the following occupational diseases:

Column One	*Column Two*
DESCRIPTION OF DISEASES	DESCRIPTION OF PROCESS
• • •	• • •
28. Any and all occupational diseases.	28. Any and all employments enumerated in subdivision one of section three of this chapter."

New York Laws 1922, c. 615, §1.

"§10. **Liability for Compensation.** Every employer subject to this chapter shall in accordance with this chapter secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment, without regard to fault as a cause of the injury, • • •."

"§11. **Alternative Remedy.** The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents, or next of kin or anyone otherwise entitled to recover damages at common law or otherwise on account of such injury or death, • • •"

Appendix A—Statutes Involved

NEW YORK WORKMEN'S COMPENSATION LAW—1936

New York Laws 1936, c. 887, §§1, 2.

"• • • Nothing in paragraph twenty-eight of this subdivision [§3(2)] shall be construed to apply to any case of occupational disease in which the last injurious exposure to the hazard of the disease occurred prior to September first, nineteen hundred thirty-five; nor to any disability or death due to any diseases described in article four-a [§§65-72] of this chapter."

"§66. **Compensation payable for disability or death.** Compensation shall not be payable for partial disability due to silicosis or other dust disease. In the event of temporary or permanent total disability or death from silicosis or other dust disease, • • • compensation [shall not] exceed an aggregate total of three thousand dollars • • •."

"§67. **Liability of Employer.** An employer shall be liable for the payments prescribed by this article for silicosis or other dust disease when disability of an employee resulting in loss of earnings shall be due to an employment in a hazardous occupation in which he was employed, and such disability results within one year after the last injurious exposure in such employment; or, in case of death resulting from such exposure, if such death occurs within five years following continuous disability from such disease. • • •"

"72. **Alternative Remedy.** The liability of an employer prescribed by this article shall be exclusive and in place of any other liability whatsoever, at common law or otherwise, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover

damages, at common law, or otherwise on account of any injury, disability, or death, caused by the inhalation of harmful dust, * * *."

PRESENT NEW YORK WORKMEN'S COMPENSATION LAW.

N. Y. Laws 1922, c. 615, §1.

N. Y. Laws 1947, c. 431, §§1, 2, 8.

[N. Y. WORK. COMP. LAW §§3(2 ¶¶28, 29); 10, 11, 39.]

"§3(2) **Occupational diseases.** Compensation shall be payable for disability sustained or death incurred by an employee resulting from the following occupational diseases:

Column One	*Column Two*
DESCRIPTION OF DISEASES	DESCRIPTION OF PROCESS
* * *	* * *
28. Silicosis or other dust diseases resulting in total disability or death.	28. Any process involving exposure to silica or other harmful dust.
29. Any and all occupational diseases.	29. Any and all employments enumerated in subdivision one of section three of this chapter.

"Nothing in paragraph twenty-nine of this subdivision shall be construed to apply to any disability or death due to any disease described in paragraph twenty-eight of this subdivision."

"§10. **Liability for Compensation.**

Every employer subject to this chapter shall in accordance with this chapter, * * * secure compensation to his employees and pay or provide compensation for their

disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury, * * * "

"§11. **Alternative Remedy.**

The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, * * * ".

"§39. **Right to Compensation.**

* * * compensation shall not be payable for partial disability due to silicosis or other dust disease * * * ".

§§65-72 repealed by New York Laws 1947, c. 431, §14.